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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 342.

DANIEL BIRMELI DINGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SECOND PETITION FOR REHEARING

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January 17, 1947.

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Petitioner's first petition for rehearing was filed December 18, 1946.* It was denied December 23, 1946. On the very day of its denial, this Court handed down its unanimous decisions in the cases of *Gibson* v. *United States,* and *Dodez* v. *United States,* Nos. 23 and 86, October Term, 1946. Petitioner now files his second petition for rehearing based on the following grounds.

I.

IN VIEW OF THE RECENT DECISIONS OF THIS COURT IN THE *GIBSON* AND *DODEZ* CASES, IT CANNOT BE OTHERWISE THAN ARBITRARY AND CAPRICIOUS TO CONTINUE TO DENY PETITIONER CERTIORARI HEREIN.

The *Gibson* and *Dodez* decisions clearly establish that conscientious objectors who have not been "actually in-

*Though counsel, at the time of filing the first petition for rehearing was not so advised, petitioner was released on parole on November 25, 1946.

ducted" even for non-combatant service, but who, like petitioner, have merely been "assigned to work of national importance under civilian direction", are not in military service of any nature whatever, but remain purely civilians in civilian service.

Nevertheless, this Court has declined in this case to issue certiorari to determine whether, as such a civilian conscientious objector, petitioner's period of assignment "to work of national importance under civilian direction" has been extended by the Extension of Service Acts of August 18 and December 13, 1941, beyond the twelve month period originally provided by the Selective Training and Service Act of 1940, even though it seems beyond question that both by their express terms and Congressional intent, such Extension Acts apply only to persons actually "in or subject to *active military service*."

In the *Gibson* and *Dodez* cases, this Court, as shown in its opinion, issued certiorari "because of the importance of the question presented for the administration of the Act."

In those cases, the petitioners claimed the right to be classified as ordained ministers of religion, and as such to be wholly exempted from training and service. They had, however, been classified as conscientious objectors opposed to non-combatant service and, as such, had been assigned "to work of national importance under civilian direction." The basic question presented was whether they could raise the question of mis-classification as a defense in a criminal trial in the one instance for refusing to report to, and in the other for immediately leaving, a conscientious objector camp, or could only raise such question of mis-classification by *habeas corpus*. The questions as to when petitioners had exhausted their administrative remedies were only incidental to this basic question.

Important as were both the basic and incidental questions in the *Gibson* and *Dodez* cases, they obviously have application only to a very limited class. Moreover, they were essentially procedural even though their determination involved the broad question whether the status of such conscientious objectors was military or civilian.

Here, on the contrary, the basic questions presented extend to a very large class of conscientious objectors. They extend not only to the criminal liability of numerous conscientious objectors who have, like petitioner, after more than twelve months of service, left conscientious objector camps allegedly without authority, but also to the civil authority to require several thousand conscientious objectors to remain in such camps after more than twelve months of service.

Moreover, the issuance of certiorari for the determination of the basic questions here presented, becomes particularly appropriate for two reasons.

First, because of the doubts expressed by the Court in the *Gibson* and *Dodez* cases, as to whether relief by way of *habeas corpus* would be available to determine the validity of the assignment of conscientious objectors "to work of national importance" under civilian direction, unless, in addition to such mere assignment, such conscientious objectors should, like petitioner, be under penal detention.

Second, the determination of the basic questions here presented would unquestionably minimize the burden upon the recently created "President's Amnesty Board", of which the Honorable Owen J. Roberts, former Associate Justice of this Court, is Chairman. As this Court is undoubtedly aware, that Board has been created to examine the cases of all persons convicted under the Selective Train-

ing and Service Act of 1940 and to recommend those persons it deems deserving of executive clemency. A large proportion of persons so convicted have, like petitioner, been convicted for leaving conscientious objector camps after more than twelve months of service. If petitioner's basic contentions be here sustained, he and such other conscientious objectors would require no consideration by such Board for executive clemency, since their convictions would be without warrant in law.

It would seem clear, therefore, that the questions here presented are not only of equal, but greater importance "for the administration of the Act" than those which this Court considered warranted the issuance of certiorari in the *Gibson* and *Dodez* cases. It is, therefore, respectfully submitted that to continue here to deny certiorari for the determination of such questions, would, in view of the *Gibson* and *Dodez* cases, be arbitrary and capricious.

II.

THE SUMMARY DISPOSITION OF THE FIRST PETITION FOR REHEARING WAS NOT JUSTIFIED.

It seems clear that this Court could not have based its denial of the first petition for rehearing herein on any informed conclusion as to the merits of petitioner's basic contentions in that petition.* These basic contentions are

*The Court's order denying the first petition for rehearing herein was entered five days after the filing of such petition. That petition included specific citations to several hundred pages of the Congressional Record, covering debates in the Senate and House in connection with the Extension of Service Acts of August 18 and December 13, 1941. It also included specific citations to several hundred pages of Committee hearings and reports.

that the legislative history of the Extension of Service Acts of August 18 and December 13, 1941 conclusively demonstrates that the Congress had no intention whatever that the extensions of service there provided should apply to conscientious objectors who, like petitioner, have never been "in or subject to active military service," and further demonstrates that the express language of those Acts limiting the extensions of service there provided to persons "in or subject to *active military service*" was therefore intentionally used.

Since the Government had not challenged these contentions and since this Court obviously did not take the time necessary to determine the factual justification for them, it can only be assumed that the Court considered such Congressional intent in the use of such expressly limiting language in the Extension of Service Acts to be irrelevant. Such Congressional intent, however, could only be irrelevant* if the Court should construe the twelve month limitation of

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*There is one other basis on which it might possibly be contended that it would be irrelevant here to prove that Congress intentionally used the express language of the Extension of Service Acts limiting their application to persons "in or subject to active military service". This would be on the theory that this would not amount to affirmative proof that Congress expressly intended to exclude from like extensions of service, conscientious objectors such as petitioner, who never were in or subject to active military service, and, therefore, that it should be assumed that the use of such limiting language was in this respect a mere oversight. It should suffice to say, (a) that the legislative history set out in the first petition for rehearing affords no basis whatever for any such assumption, (b) that such assumption would amount to judicial legislation, and (c) that such an assumption could not be justified as the basis for the imposition of criminal liability. Counsel feel justified in stating, however, that good ground exists for believing that it is, nevertheless, on the basis of such an assumption that the Government has opposed certiorari in this case.

service provided by Section 3(b) of the Selective Training and Service Act of 1940, as not applying to conscientious objectors who, like petitioner, have merely been assigned to work of national importance under civilian direction, but as applying only to persons who have been "actually inducted" for training and service, including conscientious objectors inducted for non-combatant service.

In addition to the objections to such a construction of Section 3(b) pointed out at page 3 of petitioner's Reply to the Brief in Opposition, petitioner desires to call the Court's attention to the fact that such construction of Section 3(b) would be opposed to the administrative construction placed upon that section, both by the Director of the Selective Service in the practical administration of that Act, and by the Government in these proceedings.

That the Director of Selective Service has administratively construed the twelve month limitation of service provided by Section 3(b) as applying to conscientious objectors assigned to work of national importance under civilian direction, is avowed by the Government itself in its Brief in Opposition, pages 8 and 9. There quotation is made from the First Report of the Director of Selective Service, 1940-41, *Selective Service in Peacetime*, (1942), p. 200. As there quoted, and as also quoted p. 12 of the petition for certiorari, the Director of Selective Service said

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to assignees as well, so that their term of duty was increased to 18 months. . . ."

It is therefore clear that, although the twelve months limitation of service provided by Section 3(b) of the 1940

Act does not in express terms apply to conscientious objectors such as petitioner who have not been "actually inducted" for training and service but have merely been assigned to work of national importance under civilian direction, that section has been administratively construed so to apply. It is further clear that Selective Service Regulation 652.14, for violation of which petitioner has been convicted, in purporting to extend the period of assignment of such conscientious objectors beyond such twelve month period, was necessarily based on the assumption that the Extension of Service Acts of August 18 and December 13, 1941, were intended by the Congress to apply to such conscientious objectors.

It would therefore appear that the question whether Congress intentionally used the language expressly limiting the application of such Extension of Service Acts solely to persons "in or subject to active military service" could not here be irrelevant, and that this Court, therefore, should now give mature consideration to the legislative history of those Acts in this respect, as set out in the first petition for rehearing herein.

Petitioner accordingly respectfully petitions this Court for reconsideration of its denial of certiorari herein, and prays that such writ shall now issue and that in due course thereafter, petitioner's conviction be reversed and set aside.

Respectfully submitted,

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